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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

GORDON PENNELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the strong presumption of prejudice from third party contacts with jurors in a criminal case required by Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1959) has been nullified by the decision in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)?

2. Whether federal district courts have the jurisdiction to immunize necessary defense witnesses who are unavailable as the result of an assertion of a fifth amendment self-incrimination claim, particularly, when the key prosecution witness has been immunized?

3. Whether, and under what circumstances does the defense of impossibility exist in prosecutions under the attempt provisions of Title 21, United States Code, Section 846?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

This is a Petition for Writ of Certiorari brought by Gordon Pennell, seeking a review of the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

This Petition raises several issues which present conflicts among the circuits, and in particular raises a disturbing question concerning the affirmance of a conviction after several members of a jury had been blatantly tampered with, and threatened should they not return a verdict of guilty. The court below, abandoning all prior precedent, affirmed the district court's determination of no prejudice, although that district court determination is at variance with the law of the Sixth Circuit, virtually every circuit to have considered the issue, and the decisions of this court.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported at United States v. Pennell, 737 F.2d 521 (6th Cir.

1984). (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1984. Rehearing and rehearing en banc were denied July 31, 1984. (App. B). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> "... nor shall any person ... be deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the

right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21, United States Code, Section 841(a)(1) provides:

...

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Title 21, United States Code, Section 846 provides:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.)

STATEMENT OF THE CASE

THE STING

Petitioner, Gordon Pennell, a florist in Lavonia, Michigan, reported to his local police, the Lavonia Police Department, in July, 1980, that he suspected drug activity was occurring at his floral shop, and offered to cooperate with the authorities to eradicate the problem. Through a series of bizarre twists, this act of public awareness led to the petitioner being ensnared by an insidious Government "reverse sting" operation.

Pennell, in July, 1980, was referred by the local authorities to Drug Enforcement Administration Agent Frank Catalogna. Through mid-August, 1980, Pennell relayed information concerning suspected narcotics trafficking to the authorities.

In early October, 1980, petitioner's life was threatened as a result of the information he had conveyed to the Lavonia Police Department and the D.E.A. Pennell accused the agencies of having leaked the fact of his cooperation to associates of the drug dealers on whom he had informed.

In March, 1981, Agent Catalogna, who claimed suspicion of Pennell's motives, was informed by a confidential informant that Pennell was desirous of purchasing a quantity of cocaine. With the consent of the Michigan agents, the informant provided Pennell with the name and telephone number of an undercover Florida D.E.A. agent posing as a major drug supplier.

Pennell, on April 21, 1981, contacted the undercover agent and discussed a drug deal. Shortly thereafter Pennell informed Agent Catalogna of the contact and that he

had located a major cocaine supplier.

Agent Catalogna lied that he was about to go on vacation and told Pennell they would speak in a week.

The undercover agent completed negotiations with Pennell and ultimately supplied a quantity of bogus cocaine. Pennell was arrested and charged with conspiring to possess and distribute cocaine (21 U.S.C. Sec. 846), attempt to possess and distribute cocaine (21 U.S.C. Sec. 846) and various substantive counts.

TRIAL

Petitioner's first trial ended in a mistrial, when a juror improperly received prejudicial information concerning the case from a third party. Petitioner's second trial should have met a similar fate, but did not.

The primary witness at both trials was the confidential informant whose testimony was obtained under a grant of statutory immunity. According to the informant, Pennell initiated the contact regarding the cocaine transaction, a fact which if believed, would demonstrate pre-disposition and negate the entrapment defense. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

Pennell, in an effort to rebut this evidence, and to establish that the initial contacts between Pennell and the informant were unrelated to narcotics, attempted to introduce the testimony of Charles Massad, a drug dealer who had been associated with the informant.[1/]

1/ An offer of proof was made to the district court, which is summarized as follows: Mr. Massad was involved with the informant during the entire relevant period and could (cont.)

Massad, when called by Pennell, asserted his fifth amendment right against self incrimination, and refused to testify. Pennell sought an order of immunity for Massad, which was refused. As a result, the testimony was not presented to the jury.

DELIBERATIONS

In the very early hours of a Sunday morning, during a break in the jury deliberations in this case, five jurors were

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1/ (cont.)

testify that the informant was dealing in large quantities of cocaine from a number of suppliers during the period of his cooperation with the D.E.A. The informant was also using large amounts of cocaine for personal consumption. Mr. Massad would testify that the informant approached petitioner to request petitioner's assistance in straightening out certain financial obligations. Mr. Massad could testify that, to his knowledge, petitioner's only association with the informant was to resolve financial obligations and that he never observed petitioner become involved in any narcotics transactions with the informant.

contacted and told, in essence, that they must return a verdict of guilty or they would be "sorry." The next morning, the five jurors who had been contacted notified the court of the incident, and discussed the telephone calls with other members of the jury. The foreman, in a note to the court, asked whether the jury was expected to continue its deliberations, clearly evidencing the concern of all jurors with further deliberation.

The court examined each of the five jurors individually. Although none indicated an inability to continue deliberations, two indicated that a juror who had not been contacted had expressed a concern that she might not be able to continue. This juror, a Ms. Saveski, stated to the court directly, however, that she could continue.

After the jury returned to deliberations, a subsequent note indicated that still another juror had expressed an inability to continue in light of the threatening phone calls. This juror, Ms. Lorenz, stated she was "nervous" and offered to continue deliberation "with some assurance that nothing would happen." Ms. Lorenz was sent back to deliberations, although obviously no such assurances were given.

Later the same day, the court received an additional communication indicating that the jury was still concerned about the phone calls and was having difficulty in deliberations. Various defense motions for mistrial and a motion for new trial on this ground were denied.

REASONS FOR GRANTING THE WRIT

I

THE SIXTH CIRCUIT OPINION, WHICH COUNTENANCED THREATS MADE TO THE JURORS IN THIS CASE, DISREGARDED THE OPINION OF THIS COURT IN REMMMER V. UNITED STATES, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), IGNORED DIRECTLY APPLICABLE PRECEDENT IN ITS OWN CIRCUIT, AND CONFLICTS WITH THE OPINION OF VIRTUALLY EVERY CIRCUIT TO HAVE CONSIDERED THE APPROPRIATE PROCEDURES TO BE USED ON A TAMPERED JURY IN A CRIMINAL CASE.

The jury[2/] in this case was threatened,[3/] anonymously, during deliberations to return a verdict of guilty. This blatant, prejudicial tampering admittedly intimidated

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2/ As indicated above, five jurors' houses were contacted directly. All jurors were aware of the calls.

3/ Such contacts are recognized as threats, United States v. Brown, 571 F.2d 980, 987 (6th Cir. 1978).

several jurors, but was countenanced by the trial court and the court of appeals.

In affirming the conviction over a strong dissent by Judge Celebrezze, the court below disregarded the pronouncements of this court in Remmer v. United States, supra, ignored directly applicable precedent in its own circuit, and rendered an opinion which is in direct conflict with virtually every federal circuit to consider the issue.

The reported opinion of the Sixth Circuit stands, furthermore, as a blatant misinterpretation of this court's opinion in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), a case which, itself, was met with a thoughtful dissent by three justices (Justices Marshall, Brennan, and Stevens) and a limited concurrence by a fourth (Justice O'Connor).

Properly considered, Remmer governs this case. The majority opinion below acknowledged that "were Remmer. . . controlling, we would be hard pressed to affirm Pennell's conviction." 737 F.2d at 532. Remmer requires not only that a hearing be held in appropriate cases of jury tampering or misconduct, but that a strong presumption of prejudice be applied at such a hearing. In this case, "there is no evidence in the record to suggest that the trial court applied [such a] presumption." 737 F.2d 538, 540 (Celebrezze, J. dissenting).

The majority disregarded the mandate of Remmer through a tortured and illogical application of Phillips. For, while Phillips found no presumption of prejudice to exist on the facts before it, the Sixth Circuit opinion concluded in direct conflict with

Remmer, that Phillips held that a presumption of prejudice was not to be applied at all.

Specifically, the majority below concluded that Phillips held that Remmer "does not govern the question of burden of proof where potential jury partiality is alleged," 737 F.2d 532. It found further that while "Remmer placed a heavy burden of proof upon the government. . . Phillips worked a substantial change in the law" by transferring that burden to the defendant. Ibid. n.10. Phillips, of course, did nothing of the sort. Phillips simply found no irrebutable presumption applicable, and left undisturbed the heavy presumption of prejudice to be overcome by the government. While the ultimate burden of proof still rests with the defendant, he is assisted, under both Remmer and Phillips, by the

presumption. Contrary to the conclusion below that "prejudice is not to be presumed," the presumption is a vital and integral part of a Remmer-Phillips hearing.

Nothing in the majority, concurring or dissenting opinions in Phillips supports the Sixth Circuit interpretation of that case. Phillips, in fact, relied heavily on Remmer, the very case which the court below found to be overruled by Phillips.

Virtually every circuit to have considered the issue is in conflict with the decision of the Sixth Circuit in this case. Each such circuit has found that a presumption of prejudice exists in any irregular contact with the jurors, and that a heavy burden is imposed on the prosecution to show that there is no prejudice. United States v. Flaherty, 668 F.2d 566, 601-02

(1st Cir. 1981); United States v. Bufalino, 576 F.2d 446 (2nd Cir.) cert. den., 439 U.S. 928, 99 S.Ct. 314, 58 L.Ed.2d 321 (1978); United States v. Taylor, 562 F.2d 1345, 1365 (2nd Cir.) cert. den., 432 U.S. 909, 97 S.Ct. 2958, 53 L.Ed.2d 1083 (1977); United States v. Buscia, 573 F.2d 827 (3d Cir.) cert. den., 435 U.S. 911, 98 S.Ct. 2248, 56 L.Ed.2d 411 (1978); United States, v. Forrest, 620 F.2d 446 (5th Cir. 1980); United States v. Jones, 597 F.2d 485 (5th Cir. 1979), cert. den., 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 728 (1980); Owen v. Duckworth, 727 F.2d 643, 646 (7th Cir. 1984); United States v. Treatman, 524 F.2d 320, 323 (8th Cir. 1975); Polizzi v. United States, 550 F.2d 1133, 1138 (9th Cir. 1976); United States v. Greer, 620 F.2d 1383, 1385 (10th Cir. 1980).

Indeed, the court below recognized that its decision was contrary to the strict standard of presumptive prejudice applied even in the Sixth Circuit. 737 F.2d 521, 531. See Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), cert. den., 435 U.S. 924, 98 S.Ct. 1488, 55 L.Ed.2d 517 (1978); United States v. Reynolds, 489 F.2d 4, 8 (6th Cir. 1973), cert. den., 416 U.S. 989, 94 S.Ct. 2395, 40 L.Ed.2d 766 (1974); Stone v. United States, 113 F.2d 70 (6th Cir. 1940).

Several of the cases cited above were decided after this court's decision in Phillips, notably Owen v. Duckworth, supra, a post-Phillips case which specifically discusses the Phillips rationale, and yet, in contrast to the decision below, finds that the prosecution bears a heavy burden to dispel the presumption of prejudice

from an unwarranted jury contact.[4/]

This Court has recently had occasion to decide, in summary fashion, and not without dissention, a limited aspect of this issue. Several courts had recognized that an ex parte communication between the judge and the jury was presumptively prejudicial. See United Sttes v. Taylor, supra, United States v. Treatman, supra. In Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983), the court, in a per curiam summary reversal of the affirmance of the granting of a habeas corpus petition, concluded that such ex parte contacts were not necessarily prejudicial. While the summary nature of the disposition disturbed several justices, a review of the concurring and dissenting opinions indicates the contrary streams of thought with regard to

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4/ Id. at 646.

the jury contact issue. The existence of the reported decision below serves to further confuse this area.

In view of the threatening nature of the anonymous calls, and the obvious concerns of the jurors, the jurors' volunteered statements of concern, and the highly equivocal response of some of the jurors on the issue of their impartiality, the proper application of the strong presumption mandated by Remmer would have been decisive - a fact acknowledged by the court below.

This case, therefore, is an appropriate one to resolve the present conflict among the circuits concerning the applicability of a presumption of prejudice to jury tampering hearings. The issue itself is clearly an important one which goes to the heart of the Constitution's guarantee

of a fair trial, and the accuracy of the fact-finding purpose of such a trial.

II

THE QUESTION OF THE AUTHORITY OF FEDERAL DISTRICT COURTS TO IMMUNIZE POTENTIAL DEFENSE WITNESSES HAS SPLIT THE CIRCUITS, AND PANELS WITHIN VARIOUS CIRCUITS, THEREBY CREATING SUBSTANTIALLY DISPARATE TREATMENT OF THE FIFTH AND SIXTH AMENDMENT RIGHTS OF CRIMINAL DEFENDANTS.

Although the Government immunized its key witness against the petitioner to obtain his testimony, Pennell was precluded from rebutting this testimony because a proposed defense witness asserted his Fifth amendment claim against self-incrimination. The trial court refused to grant immunity to petitioner's witness, although a detailed offer of proof regarding this testimony was made. The court below

specifically held that federal courts do not "have inherent power to immunize witnesses." 737 F.2d at 527.

This issue is one which continues to divide the circuits,[5/] has produced contrary

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[5/] The Third Circuit has taken the lead in recognizing the availability of judicial immunity either in cases of deliberate distortion of the fact-finding process by the government, or under the theory of the inherent authority of the court. Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191 (3d Cir.) cert. den., 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1978). The Third Circuit rule was approved by the Ninth Circuit in United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983), but see United States v. Brutzman, 731 F.2d 1449, 1452 (9th Cir. 1984). The Seventh Circuit, in dicta, indicated that sanctions may be imposed against a prosecution which refuses to immunize defense witnesses. United States v. Allstate Mortgage Corporation, 507 F.2d 492, 495 (7th Cir. 1974), cert. den., 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975). But see United States v. Bounos, 693 F.2d 38 (7th Cir. 1982).

The Second Circuit has adopted strict rules for the use of such immunity, and has indicated that it has "not been receptive to the idea." United States v. Bowe, 698 F.2d 560, 565, n.5 (2d Cir. 1983).

(cont.)

decisions within the same circuit,[6/] and has generated substantial commentary.[7/]

5/ (cont.)

See also United States v. Burns, 684 F.2d 1066 (2d Cir. 1982); United States v. Calvente, 722 F.2d 1019, 1025 (2d Cir. 1983).

Several Circuits have held that the court is without jurisdiction to immunize witnesses:

Fourth (United States v. Klauber, 611 F.2d 512, 517-20 (4th Cir. 1979) cert. den., 446 U.S. 908, 100 S.Ct. 1835, 64 L.Ed.2d 261 (1980));

Fifth (United States v. Heffington, 682 F.2d 1075, 1080-81 (5th Cir. 1982), cert. den. sub nom., Giella v. United States, ___ U.S. ___, 103 S.Ct. 734 (1983); United States v. Thevis, 665 F.2d 616, 639 (5th Cir.), cert. den., 459 U.S. 825, 103 S.Ct. 57 (1982); United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981) cert. den., 454 U.S. 841, 102 S.Ct. 292, 70 L.Ed. 141 (1981); United States v. Chagra, 669 F.2d 241, 259-60 (5th Cir. 1982));

Eleventh (United States v. Gottesman, 724 F.2d 1517, 1524 (11th Cir. 1984)); and

District of Columbia Circuits (Earl v. United States, 361 F.2d 531, 534-535 (D.C. Cir. 1966)).

(cont.)

6/ and 7/ (see page 24)

It is an issue which implicates basic fifth amendment due process and sixth amendment compulsory process claims on the one hand, and separation of powers issues on the other. Left unresolved, this issue threatens to work substantial injustice to defendants unable to present necessary exculpatory evidence, will lead to substantially different treatment of defendants depending on the jurisdiction

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5/ The Eighth Circuit, in United States v. Hardrich, 707 F.2d 992, 994 (8th Cir. 1983) found it was "doubtful that a district judge may order 'judicial immunity' for a reluctant witness in this circuit."

6/ Compare United States v. Bounos, 693 F.2d 38 (7th Cir. 1982) with United States v. Allstate Mortgage Corp., supra; United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983) with United States v. Brutzman, 731 F.2d 1449, 1452 (9th Cir. 1984).

7/ See, e.g., Note, The Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv.L.Rev. 1266 (1978); Note, Witness for the Defense: a Right to Immunity, 34 Vand. L.Rev. 1665 (1981).

in which they are charged, and will impinge directly on the truth-finding process of criminal trials.

The theory of judicial power to immunize witnesses finds a dual basis. First, the due process clause should prevent Government overreaching such as in this case, in which evidence on one side of the issue - the Government's side - is presented to the jury through a statutory immunity grant, while evidence on the other is withheld, because the defendant is not in the same position as the Government to compel testimony over fifth amendment objections.

Second, the sixth amendment right to compulsory process is nullified if material defense evidence becomes completely unavailable because of the assertion of a self-incrimination claim by the witness.

Under either rubric, the effect is the same, a defendant is unfairly tried by a jury that is factually misled.

This state of affairs has led several circuits to conclude that, potentially, two forms of immunity are available. Thus, if the Government uses its immunity powers in a deliberate and intentional distortion of the judicial fact-finding process, it has been held that immunity for defense witnesses would be appropriate. See, for example, Government of the Virgin Islands v. Smith, supra, 615 F.2d 964, 968; United States v. Herman, supra. Furthermore, several cases have held that the court has inherent authority to grant judicial immunity when the privileged testimony is essential to an effective defense. Id.

The question has been before the court on previous occasions (see, e.g., Autry v. McKaskle, ___ U.S. ___, 104 S.Ct. 1458, 1459 (Marshall and Brennan dissenting from denial of certiorari (1984)), but has not been decided by it. This case is a highly appropriate vehicle for resolving this issue, inasmuch as a review of the entire record is unnecessary, and the proposed testimony of the excluded witness has been preserved in a succinct offer of proof.

Additionally, the unique facts of this case, in which the petitioner asserted he was acting in aid of law enforcement, made a conviction dependent on the informant's credibility, and his unrebutted, but uncorroborated, story of prior drug dealings with the petitioner. Had this case been tried under the Third or Ninth Circuit

Rules, the withheld testimony would have been admitted, and the petitioner likely would have been acquitted.

The importance of the issue, as noted above, transcends this case, and demands resolution by this court.

III

THE PROPRIETY OF A CONVICTION FOR ATTEMPT TO POSSESS WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE UNDER 21 U.S.C. SEC. 846 HAS BEEN THE SUBJECT OF DISSENSION IN THE VARIOUS CIRCUITS, AND THREATENS THE LEGITIMACY OF THE PRESENT FEDERAL POLICY CONCERNING "REVERSE STING" OPERATIONS.

The federal government maintains a policy in "reverse sting" cases, that is undercover operations in which the government agents pose as sellers of narcotics, of not providing actual narcotics. There is, at present, serious conflict in the

circuits regarding the ability to prosecute successful "reverse sting" cases as attempts under 21 U.S.C. Sec. 846. This conflict also implicates the age-old controversy over the defense of impossibility, and threatens a notion basic to the American system of justice, that a person cannot be prosecuted for his thoughts or intentions.

The court below adopted the analysis of the Third Circuit in United States v. Everett, 700 F.2d 900 (3d Cir. 1983) to the effect that Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. Sections 841(a)(1) and 846. 737 F.2d 521, 525. Although the accuracy of statutory interpretations performed by Everett is in question, this case presents a subsidiary issue of the standards to be used in

determining whether a substantive crime of intent has been committed. Each of these issues is appropriate for review by this court.

STATUTORY INTERPRETATION OF 21 U.S.C. SECTIONS 841 and 846.

Everett undertook an analysis of the intent of Congress in enacting the Comprehensive Drug Abuse Prevention and Control Act, and concluded that Congress intended to eliminate the defens of impossibility when it enacted Section 846. 700 F.2d 900, 904. The court below completely adopted the facially invalid analysis made in Everett.

The starting point in such a review is a recognition that no federal statute contains a comprehensive definition of attempt. United States v. Rivera-Sola, 713 F.2d 866, 869 (1st Cir. 1983); United States

v. Jackson, 560 F.2d 112, 116 (2d Cir.), cert. den., 434 U.S. 941, ___ S.Ct. ___, ___ L.Ed.2d ___ (1977). Consequently, the common law definition of attempt, including its recognition of impossibility as a defense, would apply unless some contrary intent could be divined. Two facts relied upon in Everett to interpret Congress' intent actually argue against Everett's conclusion.

First, Congress has considered and rejected a generally applicable attempt statute which would have removed impossibility as a defense. See Final Report of National Commission on Reform of the Federal Criminal Law, Sec. 1001(1) (1971); see, I Working Papers of the National Commission on Reform of the Federal Criminal Laws, 360 (1970).

Consequently, Congress had before it, and refused to enact, legislation which would have eliminated impossibility, in general, as a defense.

In addition, however, the history of Section 846, as restated in Everett simply does not support the conclusion that Congress eliminated the defense of impossibility in Section 846.

The Senate version of the bill substituted the word "endeavor" for "attempt" for the stated purpose of eliminating the impossibility defense. S. 3246, 91st Cong., 2d Sess, Sec. 504 (1970); 700 F.2d 905-906. The House eventually passed the Senate-backed bill using the same language. H.R. 17463, 91st Cong., 2d Sess. Sec. 504 (1970). After hearings, the new bill was introduced which used the language "attempt" rather than "endeavor." H.R. 18583, 91st Cong.,

2d Sess., Tit.I (1970).

Rationally, the use of the word "attempt" should be interpreted to imply that the new bill intended to include the impossibility defense which had been subsumed within the attempt language. Everett, however, interprets the course of events as indicating a clear intent by Congress to remove the impossibility defense, a conclusion which is not justified by the facts, nor consistent with the rule of statutory construction that ambiguity concerning the ambit of a criminal statute must be resolved in favor of lenity. Simpson v. United States, 435 U.S. 6, 14, 98 S.Ct. 909, 913, 55 L.Ed.2d 70 (1978).

Had Congress intended to eliminate the defense of impossibility, it could have, and it was required to do so, unambiguously. The interpretation made by

Everett, and adopted by the Sixth Circuit below runs afoul of common statutory analysis, and should be clarified by this court.

CONFLICT IN THE CIRCUITS EXISTS WITH REGARD TO ANALYSIS OF ATTEMPT PROVISIONS.

Clearly, had the impossibility defense survived the Everett analysis, the petitioner in this case could not have been found guilty of attempted possession of narcotics when no narcotics were involved. Even if the defense of impossibility, as such, does not exist, chargings such as that involved in this case necessarily drag appellate courts through a morass of conflicting, contradictory, and largely indecipherable analyses.

Both Everett and United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) recognize that in attempt cases a substantial

danger exists that a prosecution may be based solely upon the defendant's intent. Oviedo makes the analysis in the terms of the impossibility defense and to that degree is directly contrary to Everett and the opinion below which reject completely the impossibility analysis. Oviedo points out, moreover, that at least three analyses of attempt provisions have been made.

The first is exemplified by the decision in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973). The Berrigan court drew a strict distinction between the intent to perform the act and the performance of the act on one hand, and whether the completed conduct constituted a crime on the other. Absent the commission of an ultimate crime, Berrigan would preclude a conviction. At the other extreme

United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973) affirmed, 484 F.2d 1271 (2d Cir. 1973), examines the objective of the defendants, i.e., their intent, and authorizes a conviction in any case in which intent to commit the crime exists.

The Oviedo court found difficulty with both analyses. Berrigan would eliminate the distinction between factual and legal impossibility; while Roman would justify prosecution based upon mens rea alone. Oviedo, therefore, took the third, or middle, ground, and permitted prosecution only in those cases in which the objective acts of the defendant, "without any reliance on the accompanying mens rea, marked the defendant's conduct as criminal in nature." 525 F.2d 881, 885.

Consequently, under Berrigan no attempt was committed by Pennell. Similarly, as a result of the unique facts of this case in which Pennell claimed to be acting in aid of law enforcement and without criminal intent, his ambiguous conduct could not corroborate his mens rea, within the meaning of Oviedo and Everett. And, finally, under Roman, Pennell did not exhibit the requisite mens rea, if indeed he was assisting law enforcement, but corroboration of his intent with his conduct would be unnecessary.

The confusion in this area is one which will floruish and persist without guidance from this court. Review should, therefore, be granted.

CONCLUSION

For the reasons cited above, it is respectfully submitted that this case is one which presents a series of important, substantial issues which have plagued the federal system and which require immediate resolution by way of granting the instant Petition.

Respectfully submitted,

WEITZMAN & RE
HOWARD L. WEITZMAN
DONALD M. RE

DATED: September 28, 1984

84-526

Office-Supreme Court
FILED
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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

GORDON PENNELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Gordon PENNELL,
Defendant-Appellant.

No. 83-1243.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 27, 1984.

Decided June 8, 1984.

Rehearing and Rehearing En Banc
Denied July 31, 1984

Defendant was convicted in the United States District Court for the Eastern District of Michigan, Julian Abele Cook, Jr., J., of one count of conspiracy to possess with intent to distribute cocaine, one count of attempt to possess with intent to distribute cocaine, seven counts of unlawful use of a communications facility and one count of unlawful carrying of a firearm

during the commission of a felony, and he appealed. The Court of Appeals, Contie, Circuit Judge, held that: (1) purchase of noncontrolled substance that defendant subjectively believed to be a controlled substance can constitute an attempt to possess with intent to distribute a controlled substance; (2) evidence supported finding that defendant intended to purchase real cocaine, thereby supporting his conviction; (3) federal courts do not have inherent power to immunize witnesses who assert privilege against self-incrimination; (4) District Court did not abuse its discretion in denying mistrial after five jurors received threatening telephone calls, and (5) Government introduced sufficient evidence to support guilty verdict on conspiracy count.

Affirmed.

Celebrezze, Senior Circuit Judge, filed dissenting opinion.

1. **Drugs and Narcotics (key) 73**

Purchase of noncontrolled substance that defendant subjectively believes to be a controlled substance can constitute an attempt to possess with intent to distribute a controlled substance. Comprehensive Drug Abuse Prevention and Control Act of 1970. §§ 401(a), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

2. **Drugs and Marcotics (key) 73**

In order to convict a defendant of an attempt to possess with intent to distribute a controlled substance for defendant's purchase of a noncontrolled substance that he subjectively believes to be a controlled substance, defendant's subjective conduct, taken as a whole, must unequivocally

corroborate the required subjective intent to purchase or sell actual narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

3. Drugs and Narcotics (key) 123

Evidence, including proof that defendant insisted upon obtaining sample of purported cocaine so that he could attempt to ascertain its quality, and paid $43,000 for two pounds of a white powdery substance resembling cocaine, was sufficient to support finding that defendant intended to purchase real cocaine, thereby supporting his conviction of attempt to possess with intent to distribute cocaine for his purchase of "sham" cocaine from undercover agents. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

4. **Witnesses (key) 304(1)**

Federal district court lacks power to grant use immunity to witness under the federal use immunity statute, or under compulsory process clause of Sixth Amendment. U.S.C.A. Const.Amend. 6.

5. **Witnesses (key) 304(1)**

Federal courts do not have inherent power to immunize witnesses who assert the privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

6. **Criminal Law (key) 1163(6)**

Burden of proof rests upon defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality; prejudice is not to be presumed.

7. **Criminal Law (key) 1155**

District court's decision not to grant mistrial after investigating allegations of

unauthorized contact with jurors should be reviewed only for abuse of discretion.

8. Criminal Law (key) 868

If district court views juror assurances of continued impartiality to be credible despite unauthorized contact with jurors, court may rely upon such assurances in deciding whether a defendant has satisfied burden of proving actual prejudice.

9. Criminal Law (key) 855(8)

District court did not abuse its discretion in refusing to grant mistrial after five jurors were contacted at their homes by an anonymous telephone caller and urged to vote guilty, where, when notified that jurors had received the threatening telephone calls, court immediately conducted hearing in order to determine whether impartiality of those jurors had been

compromised and whether other jurors had learned of the calls, court thoroughly questioned contacted jurors on an individual basis and concluded that their assertions of unimpaired impartiality were worthy of belief, and court then sought to ascertain whether the calls had affected any of the other jurors.

10. Criminal Law (key) 37(3)

Central inquiry in entrapment cases is whether law enforcement officials implanted criminal design in mind of an otherwise law-abiding citizen or whether Government merely provided an opportunity to commit a crime to one who was already predisposed to do so.

11. Criminal Law (key) 569

If defendant raises entrapment defense, government bears burden of proving predis-

position beyond reasonable doubt.

12. Criminal Law (key) 739.1(1)

In order for a claim of entrapment as a matter of law to succeed, testimony and facts must be undisputed; a court may not choose between conflicting testimony or make credibility determinations.

13. Criminal Law (key) 739.1(1)

In order for claim of entrapment to succeed as a matter of law, the undisputed evidence must demonstrate a patently clear absence of predisposition.

14. Criminal Law (key) 569

Evidence supported finding that defendant involved in "reverse buy" of "sham" cocaine from Drug Enforcement Administration undercover agents was predisposed beyond a reasonable doubt to commit offenses with which he was charged, thereby supporting

conclusion that he was not entrapped.

15. Conspiracy (key) 24

Proof of an agreement between two persons is an absolute prerequisite to obtaining conspiracy conviction.

16. Conspiracy (key) 47(12)

Proof of mere negotiations between drug traffickers will not suffice to prove drug conspiracy; conspirators must actually agree to accomplish an illegal objective or accede to illegal terms that are acceptable to both.

17. Conspiracy (key) 23

Proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction.

18. Criminal Law (key) 409(6)

Where defendant admits facts sufficient to establish an element of a crime after the crime has been committed, defendant's out-of-court admission must be corroborated; however, corroborating evidence standing alone need not establish every element of charged crime; rather, an out-of-court admission is adequately corroborated if corroborating evidence supports essential facts admitted sufficiently to justify a jury inference of their truth.

19. Conspiracy (key) 47(12)

Evidence that defendant, both before and after commission of charged crimes, made incriminating statements concerning existence of drug distribution network, plus circumstantial evidence, was sufficient to support finding defendant agreed with at least one other person to possess

with intent to distribute cocaine, thereby supporting his conviction of conspiracy to possess with intent to distribute cocaine. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

Peter J. Kelley, Ann Arbor, Mich., for defendant-appellant.

Leonard R. Gilman, U.S. Atty., Maura Corrigan, Asst. U.S. Atty. (argued), Detroit, Mich., for plaintiff-appellee.

Before ENGEL and CONTIE, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

CONTIE, Circuit Judge.

Gordon Pennell, the defendant, appeals from jury convictions for one count of conspiracy to possess with intent to distribute cocaine (21 U.S.C. §§ 841(a)(1) and 846), one count of attempt to possess with intent to distribute cocaine (21 U.S.C. §§ 841(a)(1) and 846), seven counts of unlawful use

of a communications facility (21 U.S.C. § 843(b)) and one count of unlawful carrying of a firearm during the commission of a felony (18 U.S.C. § 942(c)(2)). For the reasons set forth below, we affirm.

I.

This case involves a "reverse buy" in which Pennell paid $43,000 in cash for two pounds of sham cocaine from Drug Enforcement Administration (DEA) undercover agents who were posing as narcotics suppliers. The DEA learned of Pennell from a confidential informant. This informant had sold four ounces of cocaine weekly for the defendant prior to September 1980. Pennell had "fronted" the cocaine to the informant, i.e., the informant took the cocaine and paid for it from the proceeds of subsequent sales.

By September 1980, the informant had fallen $15,000 behind in his payments. Consequently, Pennell refused to front more cocaine and eventually "sold" the account receivable to a man named MacDonald. MacDonald thereby obtained the right to "collect" the debt. Fearing for his safety, the informant contacted the DEA in October 1980 with hopes of receiving enough money in exchange for his information that he would be able to pay his debt.

The DEA declined to pay for the information and insisted that the informant fully cooperate by testifying against Pennell and MacDonald. The informant refused to testify for fear of reprisal. The informant's last contact with the DEA was in December 1980.

In January 1981, the informant agreed to sell cocaine for MacDonald in order to

clear his account. After this plan failed, the informant found himself $11,000 further in debt.

The informant next met Pennell in March 1981. The defendant claimed to have ceased selling cocaine and asked the informant if he had been approached by a DEA agent named Frank. The informant stated that he had not.[1] The defendant then purported to forgive the informant's debt. A general conversion ensued. During this conversation, Pennell remarked that the informant had been a "dumb a--" for dealing with MacDonald at $33,000 per pound. The informant retorted that he knew the price had been inflated but that he currently could obtain cocaine

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1. The informant knew this agent to be Frank Catalonga. Pennell contends that Catalonga and the informant initiated a process by which he was entrapped. This claim will be considered in Part V of this opinion.

for $22,500 per pound from a Florida source. Pennell immediately expressed interest in the Florida cocaine because the price was low enough to allow both he and the informant to make a profit upon resale. The defendant urged the informant to have the Florida people call Pennell's office. He promised to reduce the informant's debt by $5,000 for each pound of cocaine sold.

The informant telephoned DEA Agent Rodriguez the following day and warned the latter that Pennell was aware of Agent Frank Catalonga's true identity. The informant met with Rodriguez and Catalonga that evening. After the informant again expressed a reluctance to testify, Catalonga suggested that the former supply Pennell with the Florida telephone number of DEA Agent Pedro Valazco rather than the number of the purported Florida cocaine source.

The informant agreed to this plan. Over the next week to ten days, Pennell repeatedly requested the telephone number of the Florida source. On April 16 or 17, the informant gave Pennell the number that had been supplied by Agent Catalonga.

Pennell, using the alias "Doug", called undercover Agent Velazco on April 21. The defendant offered to buy cocaine and Velazco quoted a price of $21,500 per pound. Pennell, however, demanded a sample of the cocaine before committing himself to the purchase.

Velazco then arranged for undercover Agent Wagner to meet the defendant and provide the sample. When Wagner called Pennell, a misunderstanding arose because Wagner offered to sell four pounds of cocaine whereas the defendant only wanted to purchase one pound. Pennell refused to accept Wagner's terms.

On April 29, Velazco telephoned the defendant and assured him that Wagner had been mistaken. During a subsequent conversation with Wagner, the defendant stated that he could sell at least one pound of cocaine, and possibly two pounds, immediately. Wagner agreed to meet Pennell at a local airport in order to provide the sample. On May 8, Wagner confirmed that he would arrive at the airport the following Tuesday and indicated that he might have a package of cocaine in addition to the sample if a Kansas City buyer did not want the package.

On May 12, Agent Wagner and Fredenburg met Pennell at Mettetal Airport. As Wagner showed the defendant four one-pound packages of sham cocaine, the latter remarked that he could immediately sell one pound to a "Mr. T." who was visiting Detroit from Los Angeles. After Wagner responded that

the Kansas City customer still had an option to purchase the packages, Pennell indicated that he could hold his Los Angeles customer until Wagner determined whether the Kansas City buyer would be able to purchase the cocaine.

On May 13, Wagner informed the defendant that the Kansas City buyer had been unable to complete the transaction. Pennell increased his order to two pounds. On May 14 at at Detroit airport restaurant, the defendant purchased two pounds of sham cocaine from the agents for $43,000. He was immediately apprehended. The arresting agents discovered a .38 caliber revolver concealed on his person.

The grand jury returned an eleven count indictment. The trial jury convicted the defendant on all counts, save for count six, one of the unlawful use of a communi-

cations facility counts. The district court sentenced Pennell to concurrent nine-year terms on the conspiracy and attempt counts, to concurrent one-year terms on the unlawful use of a communications facility counts and to a consecutive one-year term on the weapons count. The court also assessed fines totaling $50,000. It is from this judgment that the defendant appeals.

II.

Pennell contends that he may not be convicted of attempt to possess with intent to distribute cocaine[2] as a matter of law because the substance he purchased from the undercover agents in fact was sham cocaine. The defense essentially is one of impossibility. The resolution of this

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2. It bears emphasis that the defendant was convicted of attempt to possess with intent to distribute rather than with possession with intent to distribute.

question is important to the effective enforcement of the federal drug laws because the DEA has adopted a policy in "reverse buy" situations of not furnishing real narcotics. If the defendant's claim is meritorious, the government will be forced to supply real drugs in future "reverse buy" cases. See United States v. Everett, 700 F.2d 900, 907-08 n. 16 (3d Cir. 1983).

[1] We agree with the Third Circuit's thorough analysis in Everett and conclude that Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. §§ 841(a)(1) and 846. See 700 F.2d at 903-08. Thus, the purchase of a noncontrolled substance that the defendant subjectively believes to be a controlled substance can constitute an attempt to possess with intent to distribute under § 846. See id. at 908; United States v. Korn, 557

F.2d 1089, 1091 (5th Cir. 1977).[3]

[2] The government must, of course, prove the defendant's subjective intent to purchase (or sell) actual narcotics beyond a reasonable doubt. Meeting this burden of proof can be problematic if the substance involved in a given situation is a fake narcotic. In order to avoid unjust attempt convictions in these types of cases, the courts have fashioned the following evidentiary rule:

> In order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature. The acts should be unique

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3. Likewise, the sale of a noncontrolled substance that the defendant subjectively believes to be a controlled substance can constitute an attempt to distribut under § 846.

rather than so commonplace that they are engaged in by persons not in violation of the law.

Everett, 700 F.2d at 909; United States v. Innella, 690 F.2d 834, 835 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1526, 75 L.Ed.2d 949 (1983); United States v. Oviedo, 526 F.2d 881, 885 (5th Cir. 1976); see also United States v. McDowell, 705 F.2d 426, 428 (11th Cir. 1983). In other words, the defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to purchase or sell actual narcotics. See McDowell, 705 F.2d at 428: Innella, 690 F.2d at 835.

[3] In the present case, the jury clearly could have concluded beyond a reasonable doubt that Pennell intended to purchase real cocaine. Among the defendant's objec-

tive acts, we highlight two. First, Pennell insisted upon obtaining a sample so that he could attempt to ascertain the quality of the cocaine that he was purchasing. Second, the defendant paid $43,000 for two pounds of a white powdery substance resembling cocaine. No reasonable person would pay such a price for two pounds of a white powdery substance unless he believed the substance to be genuine contraband. Cf. Korn, 557 F.2d at 1091 ($20,000 paid for sham methaqualone tablets). We hold, therefore, that Pennell's objective acts unequivocally corroborated the necessary intent to purchase real cocaine.

The Oviedo case, heavily relied upon by the defendant, does not mandate a contrary result. In Oviedo, the defendant sold sham heroin rather than purchasing it. Under the facts of that case, the Fifth Circuit held

that the government had insufficiently corroborated the defendant's subjective intent to sell a narcotic substance. The court reasoned that the defendant's act of selling was equivocal; selling a noncontrolled substance, without more, was consistent with both guilt and innocence.[4] In the present case, however, the act which the defendant claims renders his conduct equivocal (i.e., the use of sham cocaine) was performed by the government. The government's unannounced use of sham cocaine cannot possibly be "a relevant reflection of [Pennell's] underlying intent." McDowell, 705 F.2d at 428, Innella, 690 F.2d at 835; Korn, 557 F.2d at 1091. Accordingly, the

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4. The Fifth Circuit later emphasized that adequate corroboration is possible in cases involving sellers of fake narcotics. See Korn, 557 F.2d at 1091; United States v. Hough, 561 F.2d 594 (5th Cir. 1977). The Third Circuit has reached the same conclusion. Everett, 700 F.2d at 908-09.

defendant's reliance upon Oviedo is misplaced.

III.

[4] A second assignment of error is that the district court should have granted use immunity to defense witness Charles Massab, who invoked his fifth amendment privilege against self-incrimination when requested to testify. Although a federal district court lacks power to grant use immunity to a witness under the federal use immunity statute, Pillsbury Co. v. Conboy, 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983), or under the compulsory process clause of the sixth amendment, United States v. Lenz, 616 F.2d 960 (6th Cir.), cert. denied, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980), Pennell's claim arises under the due process clause of the fifth

amendment.

The reported courts of appeals cases reflect that criminal defendants have used two theories in presenting this type of due process claim. One theory involves prosecutorial misconduct. Some courts of appeals have either held or strongly suggested that if a federal prosecutor grants use immunity to government witnesses but refuses to immunize defense witnesses with the deliberate intention of distorting the judicial factfinding process, then due process may have been violated. See United States v. Franz, 697 F.2d 188, 191 (7th Cir.), cert. denied, ___ U.S. ___, 104 S. Ct. 104, 78 L.Ed.2d 107 (1983); Government of the Virgin Islands v. Smith, 615 F.2d 964, 968-69 (3d Cir. 1980); United States v. Klauber, 611 F.2d 512, 517-18 (4th Cir. 1979), cert. denied, 446 U.S. 908, 100 S.Ct.

1835, 64 L.Ed.2d 261 (1980); Earl v. United States, 361 F.2d 531, 534 n. 1 (D.C. Cir. 1966), cert. denied, 388 U.S. 921, 87 S. Ct. 2121, 18 L.Ed.2d 1370 (1967); cf. United States v. Lord, 711 F.2d 887, 891 (9th Cir. 1983) (prosecutor alleged to have intimidated defense witness into asserting fifth amendment privilege against self-incrimination). The recommended remedy in such cases has been that a court not grant use immunity to defense witnesses, but rather that the court set aside the conviction and remand the case to afford the prosecutor an opportunity to immunize both government and defense witnesses under the use immunity statute. See Lord, 711 F.2d at 891-92; Smith, 615 F.2d at 969; Klauber, 611 F.2d at 518. On the other hand, the Second Circuit has held that a prosecutor's decision to immunize only government witnesses does not violate due

process under any circumstances. United States v. Turkish, 623 F.2d 769, 774 (2d Cir. 1980), cert. denied, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981). But see United States v. Burns, 684 F.2d 1066, 1077 (2d Cir. 1982), cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983). This court adverted to the prosecutorial misconduct theory in the Lenz case, but declined either to accept or reject the theory. 616 F.2d at 963-64.

In the present case, Pennell has not asserted the prosecutorial misconduct theory on appeal. Consequently, we emphasize that the ensuing discussion of the defendant's due process claim intimates no view on the issues of: (1) whether prosecutorial misconduct in making immunity decisions can constitute a due process violation and (2) the appropriate remedy,

assuming that such misconduct can be of constitutional magnitude. We expressly reserve those questions.

[5] On this appeal, Pennell has relied solely upon the second theory used by defendants who seek use immunity for witnesses. This theory, which has been accepted by the Third Circuit, is that the federal courts have inherent power to immunize witnesses whose testimony is essential to an effective defense. This power is said to exist independently of the prosecutor's prerogative to grant statutory use immunity to witnesses and is to be exercised in order to protect the truthfinding function of the criminal trial. Smith, 615 F.2d at 969-71. The rationale underlying this theory is that a criminal defendant should not be convicted because a witness, whose testimony would exonerate the defendant,

has invoked the privilege against self-incrimination.

The Third Circuit acknowledged that this approach implicates the separation of powers doctrine. Id. at 971. The court nevertheless held that a district court may exercise inherent power to immunize a defense witness if the witness is available, if the proffered testimony is both essential and clearly exculpatory and if no strong governmental interests countervail against a grant of immunity. Id. at 972. The court stressed that immunity should not be afforded to witnesses whose proffered testimony is ambiguous, cumulative, not clearly exculpatory or relevant only to credibility. Id. Moreover, the court identified the government's possible desire to prosecute the witness who the defendant seeks to have immunized as being the most

obvious interest countervailing against an immunity grant. Id. at 973.

The primary question that must be addressed is whether the federal courts have inherent power to immunize witnesses.[5] Despite the Third Circuit's holding to the contrary, we conclude that the federal courts have no inherent power to grant immunity to witnesses who assert the privilege against self-incrimination. See United States v. Gullett, 713 F.2d 1203, 1209 (6th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 973, 79 L.Ed.2d 211 (1984); Lenz, 616 F.2d at 962. Since the potential availability

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5. The Supreme Court's opinion in Pillsbury Co. v. Conboy does not control this question. Although the Court remarked at one point that "no court has authority to immunize a witness" 103 S.Ct. at 616, this statement was made in the context of construing the federal use immunity statute rather than the due process clause. The Court's opinion in United States v. Doe, ___ U.S. ___, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984), did not discuss the due process issue either.

of witness immunity is purely of legislative origin, Lenz, 616 F.2d at 962, the separation of powers doctrine compels us to hold that the district court lacked power to grant use immunity to witness Massab.

Other courts of appeals agree with this analysis. In an opinion authored by then Circuit Judge Burger, the court of appeals for the District of Columbia stated:

> What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony. This power is not inherent in the Executive and surely is not inherent in the judiciary. In the context of criminal justice it is one of the highest forms of discretion conferred by

> Congress on the Executive ... We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power. [Emphasis supplied.]

Earl, 361 F.2d at 534. The Seventh Circuit has also held that approving the use of judicially-created immunity would violate the separation of powers doctrine. See e.g., In Re Daley, 549 F.2d 469, 479 (7th Cir.), cert. denied, 434 U.S. 839, 98 S. Ct. 110, 54 L.Ed.2d 89 (1977); United States v. Smith, 542 F.2d 711, 715 (7th Cir. 1976).[6] Thus, while the Third Circuit's desire to insure that criminal defendants will have

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6. Although the Fourth Circuit avoided ruling on the separation of powers issue in Klauber, the court revealed its doubt that judicially-created witness immunity is tenable under the separation of powers doctrine. 611 F.2d at 517 n. 10.

every opportunity to present exculpatory evidence is admirable, the federal courts simply lack the power to effectuate that aim by immunizing witnesses.

Furthermore, the Second and Fifth Circuits have identified practical considerations that militate against recognizing the concept of judicially-created witness immunity. See Turkish, 623 F.2d at 775-79;[7] United States v. Thevis, 665 F.2d 616, 638-41 (5th Cir.), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). First, although the government theoretically is free to prosecute a witness who has obtained

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7. We acknowledge that the Second Circuit's recent Burns opinion, 684 F.2d at 1077, though citing Turkish, can be read as adopting the Third Circuit's approach. Assuming that this reading is accurate, we note that Burns is not a reasoned rejection of Turkish. Thus, we remain persuaded by the arguments made in Turkish concerning the practical effects of approving judicially-created immunity.

use immunity, the government as a practical matter may encounter great difficulty in satisfying the "heavy burden" of proving that its evidence against the witness is neither directly nor indirectly traceable to the immunized testimony.[8] See Turkish, 623 F.2d at 775; Thevis, 665 F.2d at 640 & n. 26. This is particularly true where the investigation against the witness is not yet complete. In such situations, the government may have to assign a new team of prosecutors, who are totally unfamiliar with the case, to continue the investigation and to initiate any subsequent criminal proceedings. See id. Even this expedient would not be possible in smaller prosecutor's offices. See Thevis,

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8. The "heavy burden" rule was enunciated in Kastigar v. United States, 406 U.S. 441, 461-62, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972).

665 F.2d at 640 n. 26. Moreover, the government in almost all such cases would be constrained to curtail the cross-examination of the immunized witness in order to "narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution." Turkish, 623 F.2d at 775.

Second, assuming that the government in some cases will be unable to prove that immunized testimony will not taint a prosecution of the witness, the court in effect will have decided that the current defendant, rather than the witness, should be prosecuted. The choice of whom to prosecute rests, of course, with the government and not with the courts. See Thevis, 665 F.2d at 640. If the prosecution of either the current defendant or the witness must be sacrificed in order to obtain a convic-

tion against the other, this election should be left to the government.

Third, both the Turkish and Thevis courts afforded considerable credence to the fear that judically-created witness immunity would create opportunities for cooperative purgery among criminals. Co-defendants, for example, "could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense." Turkish, 623 F.2d at 775. Both courts were convinced that the threat of purgery prosecutions would not deter such tactics because the penalty for purgery often is significantly less severe than the penalty attaching to the substan-

tive offense. See id; Thevis, 665 F.2d at 640 n. 27. Moreover, if a significant amount of purgery were to occur, then the goal of preserving the truth-finding function of the criminal trial might be impaired, rather than promoted, by granting use immunity to defense witnesses. See Thevis, 665 F.2d at 640. Since recognizing the concept of judicially-created witness immunity would violate the separation of powers doctrine and could result in serious practical consequences, we hold that the district court correctly refused to immunize defense witness Massab. Proponents of judicially-created witness immunity must seek relief from Congress rather than from the federal courts.

In the alternative, we hold that even if the Third Circuit's approach to this issue were correct, the content of Massab's

testimony would not satisfy the Smith standards. According to Pennell, Massab would have testified that the confidential informant was both selling and consuming large amounts of cocaine while cooperating with the DEA, that to Massab's knowledge, Pennell's only association with the informant was to help the latter discharge his debts, and that Massab had never observed Pennell become involved in narcotics transactions.

At trial, defense counsel argued that Massab's testimony concerning the informant's use and distribution of cocaine was relevant to the informant's credibility (Tr. Vol. I at 22). The Smith case clearly indicates, however, that immunity should not be granted under such circumstances. 615 F.2d at 972. Moreover, since the informant admitted during his testimony that

he had sold and ingested cocaine (Tr. Vol. XI at 14-19, 93-96), this portion of Massab's testimony would have been cumulative. Furthermore, we agree with the district court that the remainder of Massab's testimony would have been marginally exculpatory at best. That Massab personally did not observe the defendant engaging in narcotics transactions with anyone does little to rebut the testimony of the informant and of the DEA agents who testified that Pennell willingly and enthusiastically attempted to purchase two pounds of cocaine with the intent to distribute it. Massab's testimony simply was not as "clearly exculpatory" as was the proffered testimony in Smith. Thus, even if Smith were correctly decided, Pennell would not satisfy the standards set forth in that case.

IV.

Pennell further contends that the district court should have declared a mistrial after five jurors were contacted at their homes by an anonymous telephone caller. Jury deliberations began on Friday, January 28, 1983. Between 1:00 A.M. and 1:30 A.M. on Sunday, January 30, five jurors received anonymous telephone calls. Juror Larson was told, "Urness Larson, you had better find him guilty." Juror Page's daughter answered her father's telephone and was told, "tell Charles [Page] he better vote guilty." Juror Burgess was told, "Mrs. Burgess, find him guilty or you will wish you had." The caller told Juror Saveski, "is this Janet? You had better find him guilty." Finally, the caller in structed juror Wilcox, "Ms. Wilcox, find him guilty" (Tr. Vo. XVI at 6-7). In all five instances the caller

urged the juror to convict and then quickly hung up.[9]

On the morning of Monday, January 31, the five jurors informed their counterparts of what had happened and then notified the court. The court proceeded individually to question the five who had received calls out of the presence of the other jurors. Juror Wilcox stated that her impartiality had not been compromised and that she did not feel intimidated. She indicated that the call could have been a prank by a young person attending the school at which she taught. Juror Burgess also assured the court that her impartiality had not been affected, but indicated that Juror Saveski had exhibited apprehension and nervousness

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9. Although the government contends that the caller's statements should not be regarded as threats, similar statements were so regarded in United States v. Brown, 571 F.2d 980, 987 (6th Cir. 1978).

about the telephone calls. Burgess also stated that Saveski had not said "one way or the other whether the [telephone call] would have anything to do with her decision."

When asked if the telephone call would impair his ability to render a fair verdict, Juror Page responded, "I don't believe it is impaired in the least." Page did indicate, however, that Juror Saveski was "disturbed" about the matter and was "unsure" of herself. The court next questioned Saveski. During the ensuing discussion, Saveski stated four times in response to different questions that the telephone call had not affected her impartiality or her ability to decide the case on the basis of the testimony and exhibits. Finally, Juror Larson assured the court three times that she would exclude the telephone calls from consideration during deliberations.

With the concurrence of counsel for both parties, the court then summoned the entire jury and asked a series of questions designed to elicit whether any juror's impartiality had been compromised and whether any juror would find it difficult to render a verdict based upon the evidence and the court's instructions. When no juror responded, the court ordered the jury to resume deliberations. Defense counsel then moved for a mistrial.

After the jury resumed deliberations, the forewoman sent a note to the court which read in its entirety:

> Attention Honorable Judge Cook. We do have a juror Linda Lorenz, that does feel that the phone calls will influence her judgment in this case. Forewoman Darlene Patterson. (Tr. Vol. XVI at 36).

The court immediately summoned Juror Lorenz, who had not received a telephone call, back to the courtroom. In response to questions, Lorenz stated that listening to the other jurors had made her nervous and that she did not wish to receive a telephone call. Nevertheless, she twice indicated that the calls received by the others would not affect her verdict. In response to additional questioning, Lorenz stated three times that the calls would not affect her deliberations and further stated that she could still abide by her juror's oath. The court then asked Lorenz if she were concerned about possible safety, to which Lorenz responded by nodding her head. When asked Whether her nervousness would prevent her from continuing deliberations, Lorenz responded, "I don't know." The following transpired shortly thereafter:

The Court: ... But what I need to know from you is whether you can still perform your responsibilities as a juror?

Juror Lorenz: I believe so. As long as I have something stating or somebody stating that nothing is going to become of all this. I mean ...

The Court: I have every reason to believe that nothing will. And the Court has initiated some processes on this matter. I will say nothing more than simply that.

All right. Thank you very much. We will be back with you. (Tr. Vol. XVI at 43).

After Juror Lorenz returned to the jury room, the court denied the motion for mistrial. As to Juror Lorenz, the court found:

After examining Ms. Lorenz in the

presence of counsel and on the record, this Court believes that Ms. Lorenz, while nervous and apprehensive about potential harm to herself, that she is nevertheless able and willing to continue as a juror and, moreover, that I am satisfied that Ms. Lorenz, being aware of her responsibilities as a juror, will confine her assessment of the facts in this case to the testimony of the witnesses, the exhibits that have been received into evidence and the instructions that were presented to the Jury by the Court. Moreover, the last juror, Linda Lorenz, advised the Court that she could confine her evaluations to those three categories that I have just mentioned. (Tr. Vol. XVI at 48).

Regarding the jury as a whole, the court

found:

> It is my personal opinion, in speaking with the jurors prior to the--to this session and during the session that they were resolute in their belief that their opinion would not be swayed one way or the other by the telephone call. More specifically, I am satisfied that the jurors, in responding to my questions, were desirous of continuing in their roles as jurors and that the telephone calls would not play any part in their decision. Thus, I am satisfied that a verdict from the Jury, whether it is guilty or not guilty, will not be tainted or affected in any way by the telephone calls that were received by them on Sunday morning, between the hours of 1:00 and 1:30. (Tr. Vol. XVI at 48-49).

The Court did offer the jury the opportunity to be sequestered. The jury declined this offer and deliberated for three more days without incident before rendering its verdict.

Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), has generally been regarded as the leading case on the issue of how a district court should treat unauthorized communications with jurors. The Supreme Court in Remmer fashioned the following rule:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and

directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. [Emphasis supplied.]

Id. at 229, 74 S.Ct. at 451.

Both prior to and after Remmer, this court strictly applied the presumptive prejudice standard. See Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), cert. denied, 435 U.S. 924, 98 S.Ct. 1488, 55 L.Ed.2d 517 (1978) (civil case); United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973); Stone v. United States, 113 F.2d 70 (6th Cir. 1940). The Stone and Ferguson cases are instructive.

In Stone a juror was approached by a third party. The juror immediately reported the incident to the court and swore under oath that he had not told other jurors of the approach. The juror further assured the court that he would decide the case as though the incident had not occurred. The court then asked each juror, except for the one approached, if anything that might prejudice him had taken place, including discussions with third parties. Each juror responded in the negative. Despite the assurances obtained by the district court, this court reversed. Although the eleven jurors apparently never were informed of the content of the conversation between the approached juror and the outside party (unlike the present case), the court feared that the eleven would suspect that the one juror who had not been questioned had been

approached. This was held to be sufficient to raise the presumption of prejudice. Moreover, the court refused to accept the jurors' assurances as proof that no juror had been prejudiced. In reference, for instance, to the approached juror, the court commented:

> Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained. In the present case, the juror commendably showed anxiety at the approach to him concerning the case and whether he leaned one way or the other because of the occurrence, is beyond ascertainment.

113 F.2d at 77. Taken to its logical conclusion, this statement holds that juror assurances of impartiality can never be relied upon as rebutting the presumption of preju-

dice because jurors are incapable of determining whether or not their impartiality has been compromised.

In Ferguson, a juror named Austin visited a mutual friend of the defendant and himself. The two discussed the case against the defendant for ten or twelve minutes. Austin later remarked to a fellow juror named Hampton that the government's check kiting allegations were weak. Austin used language very similar to that which had been used by his friend. Austin also made comments to a juror named Jordan. The district court excused Austin from further service. Hampton was allowed to remain after admitting that he had heard Austin's remarks but also after assuring the court that his opinion had not been influenced. Jordan denied discussing the case with Austin.

The court reversed, indicating that the presumption of prejudice, "although rebuttable, is a rigid one." 486 F.2d at 972. Two points in Ferguson merit emphasis. First, the presumption of prejudice was not rebutted by excusing the juror who had been approached by the outside party and who had informed two other jurors of the incident. The court appears to have thought that once other jurors become aware of an unauthorized communication, the presumption of prejudice is nearly impossible to overcome.

> The district judge acted commendably in his attempts to eliminate any possible prejudice so that the trial could proceed. Unfortunately, the matter did not come to the attention of the court until after Austin had already discussed the case with other jurors. By

then it was too late.

Id. In the present case, of course, none of the jurors who received telephone calls were excused and the entire jury heard about the calls.

Second, the court in Ferguson expressed its distrust toward juror assurances of impartiality, much as it had done in Stone:

> Although Hampton assured the court that he still had an open mind on the case, and we have no reason not to believe that he made that statement honestly, we cannot ignore the fact that jurors are human beings, subject to the same suspicions, perhaps subconsciously, as all other persons. It is not unreasonable to believe that Hampton may have had his suspicions aroused that Austin's statements to him were related to Austin's excusal from the

> jury and indicative of a possible attempt by defendants to influence the jury improperly.

Id. at 971-72. The court then stated with reference to the entire jury that "we can only speculate on whether suspicions were formed that were later carried into the deliberations." Id. at 972.

Were, Remmer, Ferguson and Stone controlling, we would be hard pressed to affirm Pennell's conviction. As has been indicated, the opinions in Ferguson and Stone found the presumption of prejudice unrebutted where a jury learned of an approach to one of its members. Moreover, both opinions clearly exhibited a distrust of juror assurances of impartiality. The Supreme Court, however, has recently filed an opinion that is relevant to the case as hand. Smith v. Phillips, 455 U.S. 209,

102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Thus, the question is whether Phillips has so changed the rules relating to unauthorized communications with jurors that the presumptive prejudice standard as applied in Ferguson and Stone no longer governs. We conclude that Phillips has indeed altered the law concerning unauthorized communications with jurors.

[6] Although Phillips involved bias resulting from a juror's potential employment relationship with a law enforcement agency, the principles set forth in the opinion apply to allegations of jury partiality generally. In essence, Phillips reinterpreted Remmer. Although the Court in Phillips referred to the Remmer presumptive prejudice standard, the Court nevertheless stated:

This court has long held that the

> remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. [Emphasis supplied.]

455 U.S. at 215, 102 S.Ct. at 945. Thus, the Court held that Remmer does not govern the question of the burden of proof where potential jury partiality is alleged. Instead, Remmer only controls the question of how the district court should proceed where such allegations are made, i.e., a hearing must be held during which the defendant is entitled to be heard. 455 U.S. at 216, 102 S.Ct. at 945. In light of Phillips, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed.[10]

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10. Unlike the dissenting opinion, we read Remmer as requiring the government to do (cont.)

[7] Moreover, the Court in Phillips implied that deference should be accorded a district court's findings made after a properly conducted hearing:

> The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences

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10. (cont.)

more than come forward with evidence that unauthorized communications with jurors were harmless. As the quotation cited at 17 supra, indicates, Remmer placed a heavy burden of proof upon the government. Accordingly, Phillips worked a substantive change in the law.

> and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case. [emphasis supplied.]

455 U.S. at 217, 102 S.Ct. at 946. This language is consistent with the rule, adopted by several courts of appeals prior to Phillips, that a district court's decision not to grant a mistrial after investitating allegations of unauthorized contact with jurors should be reviewed only for abuse of discretion. See United States v. Phillips, 664 F.2d 971, 998-99 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 91982); United States v. Armstrong, 654 F.2d 1328, 1332 (9th Cir. 1981), cert. denied, 454 U.S. 1157, 102 S.Ct. 1032, 71 L.Ed.2d 315 (1982);

United States v. Almonte, 594 F.2d 261, 265-66 (1st Cir. 1979); United States v. Fleming, 594 F.2d 598, 608 (7th Cir.), cert. denied, 442 U.S. 931, 99 S.Ct. 2863, 61 L.Ed.wd 299 (1970). We hereby adopt the abuse of discretion standard of review.

[8] Finally, in contrast with this court's opinions in Ferguson and Stone, the Supreme Court in Phillips stated that juror testimony at Remmer hearings, often the evidence upon which such hearings will turn, should not be regarded as "inherently suspect." 455 U.S. at 217 n. 7, 102 S.Ct. at 946 n. 7. Indeed, the Court emphasized that "one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." Id.; cf. United States v. Blanton, 719 F.2d 815 (6th Cir. 1983) (en banc) (juror self-

evaluation during voir dire concerning whether pretrial publicity had resulted in opinions about guilt or innocence that could not be set aside). Even the dissent in Phillips recognized that juror testimony at a Remmer hearing involving unauthorized communications with outsiders is likely to be reliable because "a juror will be less reluctant to admit that he was disturbed or upset by the misconduct of a third party, than to admit that he himself acted improperly." 455 U.S. at 236, 102 S.Ct. at 955 (Marshall, J., dissenting). Accordingly, we hold that if a district court views juror assurances of continued impartiality to be credible, the court may rely upon such assurances in deciding whether a defendant has satisfied the burden of proving actual prejudice.[11]

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11. (See p. A-63)

Pennell would distinguish Phillips on the basis that the decision involved a habeas corpus petition brought pursuant to 18 U.S.C. § 2254. The majority in Phillips did state:

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11. The dissenting opinion contends that Phillips does not govern this case because it involved juror misconduct whereas this case involves unauthorized contacts by an anonymous third party. Juror misconduct is said to be potentially more prejudicial than third party misconduct. In some cases, juror misconduct may be so potentially prejudicial that bias must be conclusively presumed.

We agree that juror misconduct can be more prejudicial than unauthorized communications by third parties. We conclude, however, that this fact supports the result reached in this opinion. If a Remmer hearing at which the defendant has the burden of proving actual bias (as opposed to a hearing at which the government bears a heavy burden of disproving prejudice) is adequate to most cases involving potentially more prejudicial juror misconduct, then a fortiori such a hearing should suffice where unauthorized contacts by third parties are involved. Furthermore, if juror assurances of impartiality can be reliable in juror misconduct cases where the potential for prejudice is greater, such assurances should be reliable in cases involving unauthorized communications by third parties.

> Of equal importance, this case is a federal habeas action in which Justice Birns' findings are presumptively correct under 28 U.S.C. § 2254(d).

455 U.S. at 218, 102 S.Ct. at 946. We view this statement as an independent and alternative ground upon which the Supreme Court rested its decision not to disturb the state court's finding of nc juror bias.[12] Hence, we are convinced that had Phillips involved a direct appeal from a federal conviction, the Court would have promulgated the same guidelines concerning the burden of proof at Remmer hearings and the probative value of juror testimony at such hearings.

[9] Turning to the facts of this case,

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12. The presumption of correctness does not apply, of course, to direct appeals of federal criminal convictions.

we hold that the district court did not abuse its discretion in refusing to grant the mistrial motion. When notified that five jurors had received threatening telephone calls, the court immediately conducted a Remmer hearing in order to determine whether the impartiality of the five contacted jurors had been compromised and whether the other jurors had learned of the telephone calls. The court thoroughly questioned the contacted jurors on an individual basis and concluded that their assertions of unimpartiality were worthy of belief. In particular, the court closely questioned Juror Saveski, who two other jurors had described as apprehensive and nervous. In light of Saveski's repeated assertions of her continued ability to decide the case solely upon the evidence, the district court was entitled to find

that she remained impartial.

The court then sought to ascertain whether the telephone calls had affected any of the other jurors. The court obviously was successful in this endeavor because Juror Lorenz informed the court through the foreworman's note that her ability to deliberate might have been impaired. Again, the court engaged in extensive questioning which revealed that although Lorenz was nervous and somewhat apprehensive about the telephone calls, this nervousness would not affect her verdict. The district judge, who was in a position to evaluate Lorenz's demeanor and attitude as she answered, was satisfied that she would remain impartial. In view of the Supreme Court's holding that jurors are well qualified to say whether or not their impartiality has been compromised, and further in view of the fact

that the district court found the jurors' repeated assertions of unimpaired impartiality worthy of belief, we conclude that the district court did not abuse its discretion in holding that Pennell had not demonstrated actual prejudice.

V.

A fourth assignment of error is that the government entrapped the defendant. Pennell contends that he also was a confidential informant for Agent Catalonga. After obtaining the information about the Florida cocaine source in March 1981, Pennell telephoned Catalonga on April 17 to inform him that he was in a position to infiltrate a narcotics distribution ring. Thus, Pennell asserts that he acted thereafter in the belief that he was working for Catalonga. Catalonga and the other

informant purportedly entrapped him by giving him the telephone number of Florida DEA Agent Velazco.

[10, 11] The central inquiry in entrapment cases is whether law enforcement officials implanted a criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to commit a crime to one who was already predisposed to do so. See, e.g., United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); United States v. Norton, 700 F.2d 1072, 1075 (6th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 1885, 76 L.Ed.2d 814 (1983). If a defendant raises the entrapment defense, the government bears the burden of proving predisposition beyond a reasonable

doubt. United States v. Jones, 575 F.2d 81, 83 (6th Cir. 1978).

[12, 13] Second, in order for a claim of entrapment as a matter of law to succeed, the testimony and facts must be undisputed; a court may not choose between conflicting testimony or make credibility determinations. Sherman, 356 U.S. at 373, 78 S.Ct. at 821; United States v. Henciar, 568 F.2d 489, 491 (6th Cir. 1977), cert. denied, 435 U.S. 953, 98 S.Ct. 1582, 55 L.Ed.2d 803 (1978). Furthermore, the undisputed evidence must demonstrate a "patently clear" absence of predisposition. Henciar, 568 F.2d at 491. If either of these elements is missing, then the predisposition question is for the jury to decide. Having thoroughly reviewed the record, we conclude that Pennell's and the government's versions of the events in question were con-

flicting and that the government introduced a substantial quantity of evidence on the predisposition question. Since neither element necessary for a finding of entrapment as a matter of law is present, the district court properly submitted the entrapment claims to the jury.

[14] As has been indicated, the government's version of what transpired differs markedly from Pennell's. The defendant approached Livonia police officer Morris and Agent Catalonga on July 30 and 31, 1980 with information about narcotics trafficking that was occurring in his store. After listening to Pennell on July 31, Catalonga became convinced that Pennell himself was selling narcotics. Catalonga specifically warned the defendant that he would be prosecuted if he were involved in any illegal activity. Both the official

report of the meeting (App. at 97-98) and Catalonga's testimony (Tr. Vol. X at 114) support the conclusion that this warning was given. According to the government, Pennell could not have left the July 31 meeting thinking that he was a DEA informant.[13]

The government further contends that nothing occurred between July 31, 1980 and April 17, 1981 that could have changed this impression. Indeed, when Pennell called Catalonga on the latter date, he acknowledged that he had no authority to engage in narcotics transactions on behalf of the DEA. Early in the conversation, the

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13. Any status that Pennell may have had as a Livonia police department informant clearly ended on October 6, 1980 when he informed Officer Morris in rather strong language that he no longer wished to be associated with the Livonia police (App. at 91-93).

following exchange occurred:

> Pennell: ... Now, I have done some work tht maybe I shouldn't have done. That I told you that I was going to do when I met you last summer. And I'm in a position now where I got a lot of trust, a lot of faith with a lot of people.
>
> Catalonga: Ah huh.
>
> Pennell: And if you really want to put something together and really take a lot of people down. We can do it.
>
> Catalonga: What kind of people?
>
> Pennell: Big! You told me not to do it. Not to get involve [sic] and all the rest of that s---. You and ah you and that ah Morris that imbecile from Lo Livonia. [Emphasis supplied.]

App. at 65. Later in the same discussion, Pennell again acknowledged that he did not

have permission to commit otherwise illegal acts:

> Pennell: And I'm telling you I'm in a position right now to really really take a whole bunch of people down. I mean big suckers boy.
>
> Catalonga: And they're part of Mac-Donald's people.
>
> Pennell: Some of them are. I ran into another ah organization that isn't.
>
> Catalonga: All right, but you had nothing to do with these people huh.
>
> Pennell: I've never done business with them.
>
> Catalonga: But you've been out of the country and you've seen their stuff and.
>
> Pennell: But I've never but I I've never been in possession of merchan-dise.

Catalonga: Cause, you know that would be ah, you know that's the way I explained it before.

Pennell: I know. [Emphasis supplied.] App. at 68. Nor did Agent Catalonga authorize Pennell to engage in narcotics transactions during the April 17th conversation itself. Suspecting that Pennell was attempting to establish a defense if later apprehended for drug trafficking, Catalonga stated that he would call Pennell back in approximately a week (App. at 68). Catalonga never did so (Tr. Vol. X at 110-12). Hence, the government concludes that the defendant could not have considered himself a DEA informant when he engaged in the conduct that led to his arrest.

Furthermore, the government introduced strong evidence of predisposition. The confidential informant testified, for instance,

that Pennell was "fronting" him four ounces of cocaine per week during the summer of 1980. Catalonga testified that after listening to the defendant on July 31, 1980, he became convinced that Pennell was trafficking in narcotics because Pennell admitted, among other things, that he had invested $30,000 in MacDonald's drug business and had accompanied MacDonald on narcotics deliveries. Thus, the jury could have believed that the defendant had freely engaged in cocaine distribution in the past and was inclined to do likewise during the time period covered by the indictment.

Second, the record reflects that Pennell agreed with the informant to tap the Florida cocaine source well before he called Catalonga on April 17, 1981. The jury could have found this sequence of events to be evidence that Pennell's telephone call was

merely an attempt to establish a defense in the event of future apprehension.

Third, some of the defendant's statements made to the undercover agents during the negotiations for the two pounds of cocaine were highly probative on the predisposition issue. Pennell told the agents, for example, that he had made over seventy airplane trips to Columbia and to the Caribbean in order to import illegal drugs into this country. Furthermore, the defendant related to the agents the details of a secret Customs Service anti-drug smuggling operation that had been in effect for less than two weeks. The defendant knew what type of aircraft that Customs was using and the flight altitudes that the Service was monitoring. Pennell also summarized measures that could be taken to evade detection, such as flying below fifty

feet or above 14,500 feet, rapidly changing radio frequencies and using side-view mirrors so that government planes could not approach unseen from the rear. Taken as a whole, the government's evidence could easily have convinced the jury that Pennell was predisposed beyond a reasonable doubt to commit the offenses with which he was charged. The defendant's entrapment argument is without merit.

VI.

[15, 17] A final contention is that the government introduced insufficient evidence to support a guilty verdict on the conspiracy count. Specifically, Pennell asserts that the government failed to prove an agreement between himself and at least one other person. The defendant correctly argues that proof of an agreement between

two persons is an absolute prerequisite to obtaining a conspiracy conviction. Iannelli v. United States, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616 (1975). Proof of mere negotiations between drug traffickers will not suffice; the conspirators must actually agree to accomplish an illegal objective or accede to illegal terms that are acceptable to both. See United States v. Tombrello, 666 F.2d 485, 490 n. 3 (11th Cir.), cert. denied, 456 U.S. 994, 102 S.Ct. 2279, 73 L.Ed.2d 1291 (1982); United States v. Martino, 648 F.2d 367, 405 (5th Cir. 1981), cert. denied, 456 U.S. 943, 949, 102 S.Ct. 2006, 2007, 2020, 72 L.Ed.2d 465, 474 (1982); United States v. Enstam, 622 F.2d 857, 867 (5th Cir. 1980), cert. denied, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981), cert. denied sub nom. Holley v. United States, 451 U.S. 907, 101

S.Ct. 1974, 68 L.Ed.2d 294 (1981).

[18] The last point merits particular emphasis because the bulk of the government's evidence in this case concerned Pennell's dealings with the informant and the DEA agents. To establish an agreement between Pennell and a non-government affiliated party, the government relied primarily upon statements made by the defendant both before and after the commission of the charged crimes.[14] Before proceeding, it must be noted that the courts have distinguished between a defendant who admits facts sufficient to establish an element of a crime after the crime has been committed and a defendant who admits similar facts before, or during the commission of, a crime. The defendant's out-of-court

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14. Pennell stood trial alone. The indictments did not name the person or persons with whom he was alleged to have conspired.

admission must be corroborated in the former situation. Opper v. United States, 348 U.S. 84, 89-91, 75 S.Ct. 158, 162-63, 99 L.Ed. 101 (1954); Smith v. United States, 348 U.S. 147, 154-55, 75 S.Ct. 194, 198, 99 L.Ed. 192 (1954); United States v. Todd, 657 F.2d 212, 216-17 (8th Cir. 1981), cert. denied, 455 U.S. 926, 102 S.Ct. 1288, 71 L.Ed.2d 469 (1982), but need not be corroborated in the latter instance. Warszower v. United States, 312 U.S. 342, 347, 61 S.Ct. 603, 606, 85 L.Ed. 876 (1941)(admission before the crime); United States v. Head, 546 F.2d 6, 9 (2d Cir. 1976), cert. denied sub nom. Wheaton v. United States, 430 U.S. 931, 97 S.Ct. 1551, 51 L.Ed.2d 775 (1977) (admission during the pendency of a conspiracy); United States v. Nichols, 421 F.2d 570, 574 (8th Cir. 1970) (admission before the crime). The rationale

underlying this rule is that out-of-court admissions occurring after a crime has been completed are less reliable than similar admissions made beforehand.

The corroborating evidence standing alone need not establish every element of the charged crime. Opper, 348 U.S. at 92-93, 75 S.Ct. at 164; United States v. O'Connell, 703 F.2d 645, 648 (1st Cir. 1983). An out-of-court admission is adequately corroborated if the corroborating evidence "supports the essential facts admitted sufficiently to justify a jury inference of their truth." Id.

[19] We hold that the evidence, when viewed in the light most favorable to the government, could have been accepted by a reasonable jury as adequate to support the conclusion that Pennell agreed with at least one other person to possess with intent to

distribute cocaine. See Meyers, 646 F.2d 1142, 1143 (6th Cir. 1981). First, the defendant admitted, in a May 5, 1981 telephone conversation with Agent Wagner, that he was part of a drug distribution chain. During this conversation, Pennell indicated that he could send a pound of cocaine "down the pike" immediately and that he had one pound of the drug "down the tubes right now." When Wagner asked the defendant if he could "take a double header," i.e., two pounds of cocaine, Pennell responded, "I got the green, and I got the outlets. . . ." Since this statement was made before the completion of the criminal acts for which he was charged, the statement did not have to be corroborated.

Second, after Pennell was arrested and given the Miranda warnings, he made the following statement:

> Look, I got to get the money or the cocaine back to my people. If I don't get the money back or the cocaine back to my people, they are going to kill me. They might even kill my family. (Tr. Vol. VI at 74).

The defendant also indicated that the "people" he referred to were from the south and were of Spanish descent.

Since this admission was made after the crimes in question were completed, corroboration was necessary. Corroboration was supplied, however, by the May 5 statement made to Agent Wagner. Moreover, the government introduced evidence that the street value of the two pounds of cocaine was between $80,000 and $125,000, that Pennell distributed drugs to Montreal and to the west coast, and that Pennell's car, at the time of the arrest, contained para-

phenalia useful for "cutting" cocaine. The paraphenalia included a triple beam balance, a teaspoon, a razor blade, rubber syringes, forceps, rubber gloves, aluminum foil and seventeen plastic bags. The large amount of cocaine involved, the outlying markets in which the cocaine would be distributed and Pennell's possession of equipment useful for dividing the cocaine into smaller quantities for various distributors all support the conclusion that Pennell was not working alone. Consequently, the circumstantial evidence supports the essential fact admitted in the post-arrest statement (i.e., the existence of a cocaine distribution network) enough to justify an inference of the statement's truth.

Viewing the defendant's admissions and the circumstantial evidence as a whole, we hold that a reasonable jury could have

concluded beyond a reasonable doubt that the defendant was a member of a cocaine distribution system. The jury reasonably could have inferred that such a system was the product of an agreement and that a member of the system such as Pennell must have agreed with others to perform acts necessary to achieve the purposes for which this system was constructed. One such act would be possession of cocaine with the intent to distribute it. Although the government did not produce a witness who could directly testify that he and Pennell entered into an agreement, direct evidence of the elements of a conspiracy is not required. Meyers, 646 F.2d at 1144.

One final point merits attention. Throughout this litigation, the government has contended that the defendant's references to "Mr. T." constituted evidence of

an agreement. Having reviewed the record, however, we conclude that Pennell only indicated that he would be able to negotiate a deal with Mr. T in the near future. He did not state that an agreement with Mr. T was already in place. Accordingly, we have not treated the references to Mr. T as evidence of an agreement. See Melchor-Lopez, 627 F.2d at 888-91. Sufficient other evidence nevertheless exists to support the verdict on the conspiracy count.

VII.

The judgment of the district court is AFFIRMED.

CELEBREZZE, Senior Circuit Judge, dissenting.

The majority holds that a presumption of prejudice should not be applied in a hearing to determine juror bias when five

jurors receive late night threatening phone calls, the entire jury discusses the phone calls during deliberations, and one juror expresses privately doubts as to whether she can render an objective decision solely on the evidence. Respectfully, I dissent.

Generally, the remedy for allegations of juror bias is a hearing to determine whether actual bias exists. E.g., Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). The rule to be applied at such a hearing has long been that unauthorized contact with a juror in a criminal case is presumptively prejudicial. This rule was set forth by the Supreme Court in 1892:

> Private communications, possibly prejudicial, between jurors and third persons ... are absolutely forbidden and

invalidate the verdict at least unless their harmlessness is made to appear. (emphasis added).

Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892). The rule that any unauthorized contact with a juror during a trial is presumptively prejudicial was restated by the Supreme Court in Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956). The Court in Remmer admonished that the government has a heavy burden in overcoming the rebuttable presumption; it must demonstrate that "such contact with the juror was harmless to the defendant." Id. at 229, 102 S.Ct. at 952; Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

As the majority concedes, this Court "strictly applied the presumptive prejudice standard" in both criminal and civil cases.

United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973); Stone v. United States, 113 F.2d 78 (6th Cir. 1940). See Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), cert. denied, 435 U.S. 924, 98 S.Ct. 1488, 55 L.Ed.2d 517 (1978); Stiles v. Lawrie, 211 F.2d 188 (6th Cir. 1954). Other circuits have also applied the presumption of prejudice in Remmer type hearings to determine juror bias. See Rinker v. County of Napa, 724 F.2d 1352 (9th Cir. 1983) (unauthorized communication with jury creates presumption of prejudice and government has heavy burden to demonstrate that no prejudice resulted from such communication); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981); Misller v. Estelle, 677 F.2d 1080 (5th Cir.), cert. denied, 459 U.S. 1072, 103 S.Ct. 494, 74 L .d.2d 636 (1982); United States v. Greer, 620 F.2d 1383 (10th Cir.

1980); United States v. Fleming, 594 F.2d 598 (7th Cir.), cert. denied, 442 U.S. 931, 99 S.Ct. 2863, 61 L.Ed.2d 299 (1979); United States v Boscia, 573 F.2d 827 (3d Cir.), cert. denied, 436 U.S. 911, 98 S.Ct. 2248, 56 L.Ed.2d 411 (1978); United States v. Bufalino, 576 F.2d 446 (2d Cir.), cert. denied, 439 U.S. 928, 99 S.Ct. 314, 58 L. Ed.2d 321 (1978) (dicta). The majority disregards this overwhelming case law and holds that the Supreme Court in Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), has "reinterpreted" Remmer. In essence, the majority believes that Phillips not only departs from Supreme Court precedent, but also, overrules precedent established by this court and at least seven other federal courts of appeal.

The majority infers that the presumptive prejudice standard was altered by Phillips

because the Supreme Court noted that the defendant must prove actual bias at a Remmer style hearing. The majority must have reasoned that Remmer placed the burden of proof from the government to the defendant. Accordingly, the majority holds that the presumption of prejudice no longer applies. In my view, the majority misapprehends the role of the presumption in both Remmer and Phillips.

> A presumption has a narrow effect: A presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof.

10 J. Moore, Federal Practice Sec. 300.01 (1970). Under Remmer, a defendant has the burden of establishing that the unauthorized

juror contact was prejudicial; the defendant is aided by a presumption that prejudice did arise from unauthorized juror contact. In the absence of evidence to the contrary, a presumption operates to invalidate any verdict. In contrast, if the government introduces evidence which rebuts effectively the presumption that unauthorized juror contact was prejudicial, the court would allow the case to continue to a final jury resolution. Thus, the government has the burden of going forward with evidence to rebut the presumption. Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956). The Supreme Court's decision in Phillips it is not inconsistent with this procedure.

In Phillips, the issue was whether a conclusive presumption of prejudice should apply. The issue of a conclusive presumption, more often termed the doctrine of

"implied bias," involves a different line of cases than those which address a presumption of prejudice.[1] Phillips is merely another case which rejects the use of a conclusive presumption of prejudice under circumstances which are not extreme. In less

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[1] The presumption of prejudice doctrine is represented by Remmer v. United States, 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956), and its progeny. In contrast, the doctrine of implied bias is represented by cases such as Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950) and Leonard v. United States, 378 U.S. 544, 84 S.Ct. 1696, 12 L.Ed.2d 1028 (1964)(per curiam).

Justice O'Connor's concurrence in Phillips indicates clearly that under extreme circumstances, for example when a juror actually participates in the criminal act with a defendant, a postconviction Remmer type hearing is inadequate to safeguard a defendant's right to a fair and impartial jury. In such extreme circumstances, juror bias may be implied conclusively without a hearing. Justice O'Connor was concerned that the majority's opinion in Phillips would be read as a rejection of the implied bias doctrine in all circumstances.

Phillips and Remmer represent two different doctrines. Which doctrine applies

(cont.)

extreme cases, such as those in Phillips and the case at bar, a post-conviction hearing, where the defendant is aided by the presumption of prejudice, will suffice to determine whether juror bias exists.

There is no precedent in support of the majority's conclusion that the Supreme Court has abandoned the application of the presumption of prejudice when unauthorized contacts are made with jurors.[2] Moreover, the majority has acknowledged that if

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1 (cont.)

depends upon the gravity of the breach of the jury's integrity. In extreme cases, such as when a juror is involved in serious misconduct, bias is to be presumed conclusively. Under less serious circumstances, such as when a jury might be affected by the misconduct of a third party, a Remmer type hearing safeguards adequately a defendant's right to an impartial jury.

2 If the Supreme Court had intended Phillips to overrule Remmer and its established progeny, it would have done so clearly. Absent a clear indication that the Supreme Court has "reinterpreted" Remmer, I cannot agree with the majority's assertion that the presumption of prejudice (cont.)

Remmer and Sixth Circuit precedent did control this case, it would be "hard pressed to affirm the defendant's conviction." In my view, Remmer controls the disposition of this case.

There is no evidence in the record to suggest that the trial court applied the presumption of prejudice at the hearing to determine whether the improper jury contact was prejudicial. Because the court did not apply a presumption required by the law, the hearing was defective. In my view, the conviction should be reversed and the case remanded for a new trial.

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2 (cont.)
standard has been abandoned. In my view, the Supreme Court's opinion in Phillips does not address the dispositive issue in this case; namely, whether the court applied a presumption of prejudice at the hearing to determine whether jurors were biased by the threatening phone calls.

FILED
JUL 31, 1984
JOHN P. HEHMAN, CLERK

NO. 83-1243

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee	)	
	)	
vs.	)	O R D E R
	)	
GORDON PENNELL	)	
	)	
Defendant-Appellant	)	

Before: ENGEL and CONTIE, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the pet;ition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.*

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* The Honorable Anthony J. Celebrezze dissents from this order.

ENTERED BY ORDER OF THE COURT

/s/
John P. Hehman, Clerk

Office - Supreme Court, U.S.
FILED
DEC 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-526

In the Supreme Court of the United States

OCTOBER TERM, 1984

GORDON PENNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying a mistrial after determining that each juror was capable of rendering a fair and impartial verdict even though five jurors had received an anonymous telephone call urging conviction.

2. Whether the district court should have granted use immunity to a defense witness who invoked his Fifth Amendment privilege against self-incrimination.

3. Whether petitioner was properly convicted for attempting to possess cocaine with intent to distribute it, when the substance he purchased was in fact sham cocaine.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-526

GORDON PENNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A95) is reported at 737 F.2d 521.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1984, and a petition for rehearing was denied on July 31, 1984. The petition for a writ of certiorari was filed on September 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, one count of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, seven

counts of unlawful use of a communications facility, in violation of 21 U.S.C. 843(b), and one count of unlawful carrying of a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2). Petitioner was sentenced to concurrent terms of nine years' imprisonment on the conspiracy and attempt counts, to concurrent one-year terms of imprisonment on the counts charging unlawful use of a communications facility, and to a one-year consecutive term of imprisonment on the weapons count. Petitioner also was assessed fines totalling $50,000. The court of appeals affirmed (Pet. App. A1-A95).

1. The evidence at trial is summarized in the court of appeals' opinion. Prior to September 1980, petitioner had supplied cocaine for an individual known as "Pizza Man" to sell to others. By September 1980, however, Pizza Man was $15,000 in arrears on his payments to petitioner; accordingly, petitioner ceased supplying him with cocaine and "sold" the account receivable to someone else. Pizza Man then contacted the DEA in October 1980, in hopes of receiving money in return for information. The DEA declined Pizza Man's offer and insisted instead that he testify at future trials. Pizza Man refused to comply. Pet. App. A12-A13.

In March 1981, Pizza Man again met petitioner. Although petitioner claimed that he had ceased selling cocaine, he immediately expressed interest in Pizza Man's claim that he could obtain cocaine from a Florida source for $22,500 per pound, a price that was low enough to allow both petitioner and Pizza Man to make a profit upon resale. Petitioner urged Pizza Man to have his Florida source contact petitioner's office. Pet. App. A14-A15.

Pizza Man described his meeting with petitioner to DEA agents the next day and agreed to an agent's suggestion that he supply petitioner with the telephone number of a Florida

DEA agent rather than the number of the purported Florida cocaine source. After petitioner had received the telephone number from Pizza Man, he called the undercover agent on April 21, 1981, and offered to buy cocaine. Pet. App. A15-A16.

During subsequent conversations between petitioner and the undercover agent, petitioner stated that he could sell at least one pound of cocaine immediately and possibly two pounds, but he demanded to see a sample of the cocaine. On May 12, 1981, petitioner and two undercover agents met at an airport so that petitioner could view a sample of the cocaine. After an agent showed petitioner four one-pound packages of sham cocaine, petitioner remarked that he could sell one pound immediately to a visiting acquaintance. The agent pretended, however, that another customer had an option to purchase the packages. Pet. App. A17-A18.

The next day, the agent told petitioner that the alternative buyer had not purchased the cocaine, and petitioner increased his order to two pounds. On May 14, petitioner met the agent at the Detroit airport and purchased two pounds of sham cocaine for $43,000. Petitioner was immediately arrested, and the arresting agents discovered a .38 caliber revolver concealed on his person. Pet. App. A18.

2. Two days after the case was submitted to the jury, five jurors were contacted at their homes by an anonymous telephone caller. The caller told the jurors that they should find petitioner guilty. The next morning, the five jurors informed their fellow jurors and the district court of the occurrence. The court individually questioned the five jurors. Four jurors, Wilcox, Burgess, Page, and Larson, responded that their impartiality would not be affected, but Burgess and Page indicated that Juror Saveski seemed to be

disturbed by the calls. During the court's ensuing questioning of Saveski, the latter stated four times that her impartiality would not be affected. The court then asked the entire panel a series of questions to determine whether the telephone calls would inhibit their deliberations. The jurors' answers satisfied the court that their impartiality remained unimpaired, and the court ordered the jury to resume its deliberations. Pet. App. A42-A44.

After the jury resumed deliberations, the forewoman sent a note to the district judge informing him that juror Linda Lorenz had indicated that the phone calls would influence her judgment. The judge immediately summoned Lorenz to the courtroom. In response to questioning, Lorenz stated that she was nervous about the telephone calls, but she replied five times that the calls would not affect her deliberations or her verdict. The court next inquired whether Lorenz was concerned about her safety. Lorenz replied that she was unsure whether her nervousness about her own safety would prevent her from continuing deliberations, but she believed that she could continue if she had some assurance that "nothing is going to become of all this." The court replied that it believed nothing would happen and stated that it had "initiated some processes on this matter." Pet. App. A44-A46.

Thereafter, the district court denied petitioner's motion for a mistrial. The court was satisfied that juror Lorenz would "confine her assessment of the facts in this case to the testimony of the witnesses, the exhibits * * * and the instructions." As to the jury as a whole, the court was satisifed that the jurors desired to continue their deliberations and that the telephone calls would not play any part in their decision. The court further found that the verdict would not be tainted by the telephone calls. The court did offer the jurors the opportunity to be sequestered, but they declined the offer and deliberated for three more days without incident before returning a verdict. Pet. App. A46-A49.

3. The court of appeals affirmed, one judge dissenting. The court first rejected petitioner's contention that he could not be convicted of attempting to possess cocaine with intent to distribute it because the substance he purchased from the undercover agents was sham cocaine. The court concluded that Congress intended to preclude a defense of impossibility in such circumstances and that a defendant may properly be convicted so long as proof of the defendant's objective conduct corroborates the necessary subjective intent to sell actual narcotics. Pet. App. A19-A25.

The court also rejected petitioner's contention that the district court should have granted use immunity to a defense witness who invoked his Fifth Amendment privilege against self-incrimination and refused to testify. The court unequivocally rejected the notion that federal courts have inherent power to immunize defense witnesses, noting the intrusion on Executive Branch prerogatives that recognition of such power would entail. Alternatively, the court held that, even if the federal courts do have inherent authority to grant immunity to defense witnesses, such authority would not have been properly exercised in this case. The witness for whom petitioner requested immunity would have testified, inter alia, that *he* had never personally observed petitioner engaging in narcotics transactions; he would not have been able to rebut the testimony of the informant and the DEA agents that petitioner "willingly and enthusiastically" attempted to purchase two pounds of cocaine with intent to distribute it. Thus, the witness could not have given "clearly exculpatory" testimony, and some of his testimony would have been cumulative. Under these circumstances, the court held that a judicial grant of immunity would have been inappropriate. Pet. App. A25-A40.

Finally, the court held that the district court had not abused its discretion in refusing to grant petitioner's motion for a mistrial made in connection with the jury tampering

incident. The court recognized that *Remmer* v. *United States*, 347 U.S. 227 (1954), applied a standard of presumptive prejudice to cases of jury tampering. The court nonetheless concluded that this Court's recent decision in *Smith* v. *Phillips*, 455 U.S. 209 (1982), abolished the presumptive prejudice standard and substituted a rule requiring the defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. The court also concluded, based on *Phillips*, that a district court may rely on juror assurances of impartiality in determining whether actual bias exists. Applying this rule to the facts of this case, the court held that, in light of repeated juror assurances that the calls would not affect their impartiality, the district court had not abused its discretion in holding that petitioner had failed to demonstrate actual prejudice requiring a mistrial. Pet. App. A41-A67.

Judge Celebrezze dissented. In his view, the rule established in *Remmer* is that the defendant has the burden of proving prejudice, but the defendant is aided by a presumption that prejudice did occur. The government then bears the burden of coming forward with evidence to rebut that presumption. Judge Celebrezze concluded that *Phillips* did not alter this rule. Rather, *Phillips* merely rejected the use of a conclusive presumption of prejudice under circumstances that were "not extreme." In such instances, a *Remmer* hearing, at which the defendant is aided by a presumption of prejudice, is sufficient to determine whether juror bias exists. Judge Celebrezze then concluded that the *Remmer* hearing in this case was "defective" because there was no evidence in the record to suggest that the district court applied a presumption of prejudice. Accordingly, Judge Celebrezze would have reversed petitioner's conviction. Pet. App. A86-A95.

ARGUMENT

1. Petitioner first contends (Pet. 12-21) that the anonymous telephone calls intimidated the jurors during deliberations, creating a "presumption of prejudice" that was not overcome at the subsequent *Remmer* hearing. On the facts of this case, petitioner's contention is without merit.

We do not dispute petitioner's contention (Pet. 14-15) that the majority below misread *Phillips* when it concluded that that decision overruled *Remmer's* presumption of prejudice. As Judge Celebrezze correctly noted (Pet. App. A92-A94), *Phillips* did not address the presumption of prejudice at all, but instead held only that "imputed bias" could not suffice for a showing of actual bias. At the same time, however, we cannot agree with petitioner that a correct reading of *Phillips* would have altered the result in this case.[1] The presumption established in *Remmer* does not mandate an automatic new trial; rather, the presumption does no more than establish the need for a hearing at which the district court must make the ultimate determination of whether the jury is actually biased. See, *e.g., United States* v. *Williams*, 737 F.2d 594, 612 (7th Cir. 1984) (anonymous telephone calls urging conviction did not prejudice defendant).

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[1]Petitioner relies (Pet. 20) on the majority's statement (Pet. App. A56) that it would have been "hard pressed" to affirm petitioner's conviction were "*Remmer, Ferguson* and *Stone* controlling." In context, it is clear that the court was referring not to *Remmer's* presumption of prejudice alone, but to its own prior decisions in *United States* v. *Ferguson*, 486 F.2d 968 (6th Cir. 1973), and *Stone* v. *United States*, 113 F.2d 70 (6th Cir. 1940), in which it had refused to accept juror assurances of impartiality as sufficient to overcome the presumption of prejudice established in *Remmer*. The court below correctly concluded that *Phillips* did effectively overrule these prior decisions (see 455 U.S. at 217 n.7), and thus there is no merit to petitioner's claim that the court would have reversed his conviction had it correctly understood *Remmer's* presumption of prejudice.

Such a hearing was held in this case, and the district court fully complied with the teachings of *Remmer* and *Phillips*. The district court carefully questioned each of the jurors and satisfied itself that the telephone calls would not affect any juror's ability to render a fair and impartial verdict. There was, of course, no error in the district court's reliance on the jurors' statements concerning their ability to render a fair and impartial verdict, *Phillips*, 455 U.S. at 217 n.7, and the district court was in the best position to assess their ability to continue their deliberations. Thus, whether or not the district court initially considered the calls to be "presumptively prejudicial" is of no import once the court found that no actual bias existed.[2]

As a practical matter, it is difficult to see what more a district court can do to ascertain whether an incident of this nature has been prejudicial than to hold a hearing, listen to and observe the jurors, and determine whether their assurances that they will be able to proceed with their deliberations uninfluenced by the incident are credible. What petitioner really seeks, therefore, is the recognition of an irrebuttable presumption of prejudice, with an absolute

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[2]Although the record does not explicitly show that the district court treated the calls as presumptively prejudicial, the court's response to the calls suggests that it did. As soon as it learned of the calls, the court undertook the hearing mandated by *Remmer* and made the necessary findings with respect to each juror's ability to continue deliberations. The fact that the court ultimately concluded that there was no actual bias in no way suggests that the hearing was "defective" (Pet. App. A95). Moreover, it bears note that the district court had already once before declared a mistrial in this same case after becoming convinced that a juror's conduct had so tainted the appearance of objectivity that the parties and the public could not be assured that a verdict would be rendered on the evidence. XVI Tr. 46. Thus, the court was clearly capable of distinguishing actual prejudice from presumed prejudice that, upon investigation, turned out to be harmless.

right to secure a mistrial. Nothing in *Remmer* requires such a result.[3]

2. Petitioner next contends (Pet. 21-26) that the district court erred in not judicially immunizing a proposed defense witness. Petitioner claims that district courts have inherent power to grant immunity and that that power should have been exercised in this case. Petitioner's argument is without merit.

The decision whether or not to confer immunity on a witness is entrusted to the Executive Branch and is ill-suited for consideration by the courts. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 11; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261-262 (1983). The courts of appeals have concluded overwhelmingly that the judiciary is not authorized to immunize witnesses, and this Court has consistently declined review of such decisions.[4]

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[3]We must also observe in this connection that it is the defense, not the prosecution, that ordinarily benefits from a mistrial and that is more likely to have motivation to take action to precipitate a mistrial. While there is no showing in this case who was responsible for the calls to the jurors, it is not hard to foresee a considerable increase in such untoward incidents if their occurrence would lead to virtually automatic mistrials.

[4]See, *e.g.*, *United States* v. *Todaro*, No. 84-1086 (2d Cir. Sept. 11, 1984), slip op. 6201-6205; *United States* v. *Taylor*, 728 F.2d 930, 933-936 (7th Cir. 1984); *United States* v. *Gottesman*, 724 F.2d 1517, 1523-1524 (11th Cir. 1984); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir. 1983), cert. denied, No. 82-6986 (Nov. 28, 1983); *Autry* v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, No. 83-5720 (Mar. 13, 1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *L'Hoste*, 640 F.2d 693, 695 (5th Cir. 1981); *United States* v. *Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851 (1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980),

As petitioner points out (Pet. 22), the Third Circuit has held that district courts have the authority to order immunity for prospective defense witnesses in exceptional circumstances. See *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980). The Third Circuit stands alone in so holding and has never applied its holding to any case since *Smith*. Moreover, as noted above, this Court has repeatedly declined to review the issue notwithstanding the divergent view of the Third Circuit; no different result is called for here. In any event, petitioner could not prevail even under the Third Circuit's standard. By its terms, the Third Circuit's rule is applicable only where, among other requirements, "the defendant * * * make[s] a convincing showing * * * that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case." *Smith*, 615 F.2d at 972. Here, as the court of appeals concluded (Pet. App. A38-A40), the proffered testimony of the defense witness did not satisify these requirements.

According to petitioner (Pet. 8-9 n.1), the witness would have testified that the informant consumed large amounts of cocaine, that petitioner's only association with the informant was to help the informant discharge his debts, and that the witness had never observed petitioner become

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cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Klauber*, 611 F.2d 512, 517-520 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); see also Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983).

involved in a narcotics transaction. Hence, the witness's testimony would have related only to the informant's credibility and not to petitioner's guilt or innocence, and it would have done little to rebut the evidence against him. Thus, this case is a far cry from the unique situation in *Smith*, in which the Third Circuit concluded that a judicial grant of immunity for a defense witness would have been appropriate.[5]

3. Finally, petitioner argues (Pet. 28-37) that his conviction for attempting to possess a controlled substance that was not, in fact, a controlled substance was legally impossible and contrary to congressional intent. Petitioner's argument lacks merit.

First, the legislative history of the attempt provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 846, demonstrates Congress's intent to eliminate the impossibility defense. The Third Circuit thoroughly reviewed this history in *United States* v. *Everett*, 700 F.2d 900 (1983). As the court there noted, the original Senate version of the attempt provision employed the word "attempt." That bill was amended to substitute the word "endeavor" for "attempt" in order to eliminate the "impossibility" defense. S. 3246, 91st Cong., 1st Sess. § 504 (1970); S. Rep. 91-613, 91st Cong., 1st Sess. 26 (1969). The House considered a similar bill that also contained the word "endeavor." H.R. 17463, 91st Cong., 2d Sess. § 504 (1970). A new bill was then introduced in the House to add an additional title dealing with drug addiction; the new bill

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[5]In *Smith*, the defendant requested the court to confer immunity on an exculpatory witness, a juvenile subject to the exclusive jurisidiction of local Virgin Islands authorities. The local authorities offered the witness immunity, but, as a matter of prosecutorial courtesy, stated that the offer was conditioned on the consent of the United States Attorney. The United States Attorney, who had no jurisdiction over the juvenile in any event, inexplicably refused to consent to the proposed grant of immunity by the local authorities. 615 F.2d at 967.

used the word "attempt" instead of the word "endeavor." H.R. 18583, 91st Cong., 2d Sess. § 506 (1970). House members were advised, however, that both House bills punished the same conduct, and the new bill eventually passed the House and Senate. See *Everett*, 700 F.2d at 906. Hence, the reassurance that "endeavor" and "attempt" were to be used interchangeably, together with Congress's manifest determination to tighten the drug laws (*id.* at 906-907), led the court in *Everett* and the court below to the correct conclusion that Congress intended to eliminate the impossibility defense from the attempt provision (Pet. App. A20-A21).[6]

Petitioner also claims (Pet. 34-37) that the courts of appeals are in conflict over what the government must prove in an attempt case when the substance intended to be purchased is not a controlled substance. Contrary to petitioner's analysis, however, the court below and other courts of appeals are in agreement that the government must prove objective acts performed by the defendant sufficient to show criminal conduct, without reliance on the defendant's subjective intent. See Pet. App. A21-A22; *Everett*, 700 F.2d at 909; *United States* v. *Innella*, 690 F.2d 834, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1071 (1983); *United States* v. *Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976). Here, as the court below concluded, petitioner's conduct, which included a request for sample cocaine and the payment of $43,000 for two pounds of a white powdery substance resembling cocaine, clearly permitted the jury to conclude beyond a reasonable doubt that petitioner intended to purchase real cocaine.

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[6]Other courts of appeals also have rejected the impossibility defense to attempt charges under 21 U.S.C. 846. See *United States* v. *Innella*, 690 F.2d 834, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1071 (1983); *United States* v. *Quijada*, 588 F.2d 1253, 1254-1255 (9th Cir. 1979); *United States* v. *Hough*, 561 F.2d 594, 595-596 (5th Cir. 1977); *United States* v. *Marin*, 513 F.2d 974, 976 (2d Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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